

1 UNITED STATES DISTRICT COURT

2 EASTERN DISTRICT OF NEW YORK

3 YELENA RUDERMAN,

Docket No.

1:19-cv-02987-CBA-RLM

4 Plaintiff,

5 v.

Brooklyn, New York

Tuesday, February 22, 2021

6 LAW OFFICE OF YURIY

3:00 p.m.

7 PRAKHIN, P.C., ET AL.,

8 Defendants.

9
10 TRANSCRIPT OF MOTION HEARING
11 BEFORE THE HONORABLE ROANNE L. MANN
UNITED STATES MAGISTRATE JUDGE

12 APPEARANCES:

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1 P R O C E E D I N G S

2 THE COURT: This is Judge Mann on the line. I'm
3 conducting a telephonic hearing in Ruderman versus Law Office
4 of Yuriy Prakhin, et al., 19-cv-2987. As a preliminary
5 matter, I just wish everyone well and I hope everyone is safe
6 and healthy.

7 Let me begin by taking a roll call. Who is on the
8 line on behalf of the Plaintiff Yelena Ruderman?

9 MS. HUOT: Good afternoon, Your Honor. Thank you.
10 I hope you're doing well, as well. This is Innessa Huot from
11 Faruqi & Faruqi, and I have on the line with me also Alex
12 Hartzband, also from Faruqi & Faruqi, for the Plaintiff.

13 MR. HARTZBAND: Yeah. Hi, Your Honor.

14 THE COURT: All right. Welcome to both of you.
15 And who do I have on the line on behalf of the Defendants?

16 MS. PRICE: Good afternoon, Your Honor. This is
17 Nicole Price from Putney Twombly representing Defendants.

18 THE COURT: All right. And is anyone else on the
19 line for Defendants?

20 MS. PRICE: No, Your Honor.

21 THE COURT: All right. As I said, this is on for a
22 hearing on motions, discovery-related motions. I will
23 address the issues and have counsel address the issues in the
24 order in which they were presented to the Court. I realize
25 that's somewhat arbitrary because it was clear that Plaintiff

1 was planning to move to compel, and before the Plaintiff
2 filed her application, the Defendant -- Defendants filed
3 theirs. But since they came in first and they raise fewer
4 issues, let's address those first.

5 And for the record, I would note that the
6 Defendant's motion to compel is docket entry number 45. The
7 Plaintiff's opposition is docket entry 49. And there are two
8 aspects of that motion. There is a Defendant's request the
9 Plaintiff provide information about the search that she
10 conducted for her communications. In particular, they note
11 recent production of Google Hangout messages and Plaintiff's
12 representation that she lost her cell phone in March of 2019.

13 The other aspect of the Defendant's motion to
14 compel challenges the Plaintiff's attorneys' eyes only
15 designations and redactions in connection with invoices that
16 she produced for the per diem work that she has been doing
17 since she was terminated by the Defendant. Those documents
18 go to her efforts to mitigate damages.

19 I'll hear first from defense counsel. Ms. Price,
20 let me just clarify a few points with you. In response to
21 your motion, Plaintiff's counsel states that predecessor
22 counsel for Defendants was advised quite some time ago that
23 the Plaintiff had lost her cell phone while on vacation. Do
24 you have any basis for denying that that disclosure was made
25 quite some time ago?

1 MS. PRICE: Your Honor, Defendant's new counsel did
2 not receive any information or documentation or notes from
3 prior counsel regarding this matter, loss cell phone.
4 Additionally, Plaintiff's counsel in a meet and confer
5 indicated that they had possibly told this to former counsel
6 in February of 2020, which is the same month that counsel was
7 being transferred. So it's unclear exactly when former
8 counsel was told, if ever, and if he was told, if that was
9 before the change of counsel occurred.

10 THE COURT: I take it the short answer is you
11 don't -- you can't deny that that information was provided to
12 predecessor counsel for Defendants?

13 MS. PRICE: Yes, Your Honor. We do not know.

14 THE COURT: And --

15 MS. PRICE: But we have no information that it was.

16 THE COURT: Before -- I'm sorry. I couldn't hear
17 what you said. You have what?

18 MS. PRICE: I'm sorry. We have no indication that
19 it was provided to former counsel.

20 THE COURT: Well, you have no indication because
21 you said you didn't receive information or notes from
22 predecessor counsel. That certainly is not an omission that
23 should be attributable to Plaintiff or Plaintiff's counsel.
24 Did you inquire of your predecessor as to whether or not that
25 information had been provided to your predecessor?

1 MS. PRICE: Your Honor, I'm not sure. I can find
2 out if other counsel in this case has made that inquiry. But
3 to my knowledge, we haven't received any communication from
4 former counsel whether or not he knew of this.

5 THE COURT: And as I understand your motion, what
6 you're seeking in connection with the text messages and
7 instant messages is information about the search that was
8 conducted on behalf of Plaintiff. Is that right?

9 MS. PRICE: Yes, Your Honor. We believe it's
10 appropriate for Plaintiff to provide us with information
11 regarding the time, the manner, what was conducted, what was
12 searched, or allow for a limited reopening of discovery so
13 that Defendants can pursue this issue.

14 THE COURT: At any time during the discovery
15 period, did you serve any discovery demand regarding the
16 nature of the search that had been conducted?

17 MS. PRICE: No, Your Honor.

18 THE COURT: So why should the Court order that
19 information to be provided?

20 MS. PRICE: Your Honor, I think it's important the
21 timeline here in that Plaintiff had over four months to
22 conduct the searches and respond before she actually produced
23 information that was responsive. And this occurred, you
24 know, several months after she had represented that she had
25 no responsive documents. And then all of a sudden, just days

1 before the close of discovery, she apparently did have her
2 responsive documents. So Defendants were blindsided at the
3 very end of discovery and didn't have the opportunity to look
4 into this further, which is why we are now seeking relief
5 from the Court.

6 THE COURT: And when you say you were blindsided,
7 that was by the Google Hangout messages that were produced?

8 MS. PRICE: Yes, Your Honor. By the Google Hangout
9 messages and the new information about the missing cell
10 phone.

11 THE COURT: Well, again, you say that it's new,
12 Plaintiff's counsel says it was not new, and you're not in a
13 position to deny that?

14 MS. PRICE: Yes, Your Honor.

15 THE COURT: The Google Hangout messages you say
16 were produced days before discovery ended, when did
17 Plaintiff, or Plaintiff's counsel more accurately, respond to
18 the discovery demand by saying that she had no responsive
19 documents? And I assume by that, you mean no responsive text
20 messages or instant messages?

21 MS. PRICE: Yes, Your Honor. It was in September
22 of 2020 that she responded with no -- with the no responsive
23 documents. And it was just prior to her deposition, which
24 was conducted on September 24th, 2020.

25 THE COURT: And again, when you say you were

1 advised that there were no responsive documents, we're
2 talking specifically about text messages and instant
3 messages? I presume that there were documents produced, but
4 it was only with respect to text messages and instant
5 messages that you were advised she had no such documents.

6 MS. PRICE: Yes, Your Honor. The request was
7 specific to text messages, instant messages, any kind of
8 instant communication, whether it's via chat room or Skype or
9 the Zoom chat, anything to that effect. And our request was
10 very specific and detailed different examples of what we were
11 looking for.

12 THE COURT: All right. Let me ask, who's going to
13 be speaking on behalf of Plaintiff during this proceeding?

14 MS. HUOT: I am, Your Honor. This is Innessa Huot.
15 Thank you.

16 THE COURT: All right. Ms. Huot, you produced
17 Google Hangout messages, which you explain in your submission
18 to the Court were retrieved from the Plaintiff's email
19 account. Why were those produced days before discovery
20 ended? What was the reason for the delay?

21 MS. HUOT: Thank you, Your Honor. And just to
22 note, discovery ended January 18th, 2021. This was produced
23 in September 2020, so it wasn't really days before. And the
24 reason for that is quite technical, our firm has IT protocols
25 that block certain communications, like Google chat, and we

1 didn't realize these messages existed until that September
2 2020. And once we realized that, we produced them
3 immediately, and have since removed those protocols to make
4 sure nothing else is missing. We double-checked. Nothing
5 else was missing. They were produced as soon as we got them.

6 THE COURT: I'm sorry. What was the date they were
7 produced?

8 MS. HUOT: I believe they were produced September
9 2020. I can confirm that for sure, but I believe Ms. Price
10 just said they were produced shortly before Plaintiff's
11 deposition, and Plaintiff was deposed in September 2020.

12 THE COURT: What I heard her say, and I'll let her
13 clarify, but I heard her say that in September of 2020, days
14 before the deposition of Plaintiff, the Defendants were
15 informed that there were no responsive text messages, instant
16 messages, and the like. And I think what she said was that
17 the Google Hangout messages were produced, I don't remember
18 if she said January, but she said days before fact discovery
19 ended. But let me hear, rather than put words in her mouth.

20 Ms. Price, do you want to clarify?

21 MS. PRICE: Thank you, Your Honor. Yes. The
22 Google Hangout messages were produced to Defendants in one of
23 Plaintiff's discovery productions on January 8th, 2021, and
24 that's indicated by the Bates stamps on those documents. But
25 the responses to Defendant's demands, which were served in

1 August, we received the responses saying that Plaintiff had
2 no document responses to our demands, which would be demands
3 number 1 and 2 in that set of requests, in September just
4 before Plaintiff's deposition.

5 MS. HUOT: Your Honor --

6 THE COURT: I'm sorry, so the date -- the date of
7 production was January, what, for the Google --

8 MS. PRICE: 8th.

9 THE COURT: January 8th?

10 MS. PRICE: Yes, Your Honor, of 2021.

11 THE COURT: All right. Ms. Huot?

12 MS. HUOT: Your Honor, I have to go back and check
13 the date of production. It was produced whenever we got it.
14 I'm not -- I'm going through the documents, as we speak, to
15 assess exactly when it was produced. The point is these
16 documents are not related to her cell phone. These documents
17 came from her email, and those emails have a Google chat.
18 That Google chat is a --

19 Oh yeah. So my colleague just confirmed that it
20 was produced January 8th. I apologize. Earlier, I only said
21 September because I thought that's what was being said prior.
22 It was related to her email. We produced everything. We
23 produced it then because that's when we received it.

24 We have, like I said before, we have a protocol
25 that blocks certain things on our computer so that we can't

1 chat to each other, and we realized it, that it was there, we
2 produced it. And we have since removed those things and
3 there's nothing else. So, you know, we produced it as soon
4 as we got it. And there's nothing else missing.

5 THE COURT: Well, what is it that resulted in the
6 discovery of these Google Hangout messages in January after
7 the search had presumably been done back in August or
8 September?

9 MS. HUOT: Sure, Your Honor. As far as I remember,
10 now I'm trying to think back specifically, it was a time
11 period when we worked from home, and I recall doing a lot of
12 this analysis on my computer, and I don't have those
13 protocols blocked on my computer from home. So it's likely
14 that's why it was discovered then, I believe.

15 And going back, I'm not 100 percent sure, but I
16 believe that's what it was, why it happened that way. There
17 was a time period around Thanksgiving when there was a lot of
18 travel at our firm, and our firm had everybody working from
19 home around that time. And it was around Thanksgiving to
20 Christmas, around that time to New Years'. And then around,
21 you know, 14 days after that. And around this time period, I
22 believe, that's when it was -- if I remember correctly,
23 that's when it was discovered. But I'm not really sure what
24 else I can say about this. We produced it.

25 THE COURT: Well, you're using the passive voice.

1 You almost make it sound like you personally discovered these
2 messages when you were using a home computer that didn't have
3 the same protocols. Is that accurate that you, yourself,
4 discovered it?

5 MS. HUOT: That's right, Your Honor. We personally
6 searched it.

7 THE COURT: You're saying "we." You, individually?

8 MS. HUOT: Yes. Me and my colleague. Yes.

9 THE COURT: And were you the ones who conducted the
10 earlier search in which there was a protocol that prevented
11 the accessing of those messages?

12 MS. HUOT: Yes. We conducted all the previous
13 searched on this. Yes.

14 THE COURT: "We," meaning you and your colleagues?

15 MS. HUOT: Yes.

16 THE COURT: And when you say that there was a
17 protocol that prevented you from accessing the Google Hangout
18 instant messages, I had incorrectly assumed that it was a
19 protocol that was applied to Plaintiff's email account, that
20 it arose out of her email account, and perhaps the
21 Defendant's protocol from her employment, with the
22 Defendant's. But now I'm wondering if you're saying that
23 what prevented those communications from being accessible was
24 a protocol on your own office computer.

25 MS. HUOT: That is what it is. Yes, Your Honor.

1 We have certain websites that are blocked, and we have -- at
2 our office computers, we have certain websites that are
3 blocked, and we have certain chat functions that are
4 disabled. That's why we didn't see it before.

5 THE COURT: So it's your law firm, not the
6 Defendant's law firm, that has the protocols that block those
7 communications?

8 MS. HUOT: Yes. As far as I know. I don't know
9 what the Defendant's -- I cannot speak on what protocols
10 Defendant's law firm has. I do not know. I know that we
11 can't chat on CHI Chat. We can't Google chat at our law
12 firm. That would be blocked.

13 THE COURT: And when you were able to discover
14 these communications using your home computer, you did -- you
15 did a thorough search and whatever you came up with that was
16 responsive was produced?

17 MS. HUOT: Yes.

18 THE COURT: All right. I'm prepared to rule on
19 this aspect of the Defendant's motion. I don't believe there
20 is -- well, before, I just want to confirm you did, in fact,
21 notify predecessor counsel for Defendants that your client
22 had lost her cell phone -- the cell phone that she would have
23 had at the time that she was employed at the Defendant's law
24 firm?

25 MS. HUOT: Yes. We reported it that -- we told

1 predecessor that it was, in fact, stolen in March 2019 when
2 she was on vacation in the Bahamas. That she reported this
3 theft to the hotel, whatever it was called, and that was all
4 we knew of it. Nothing happened.

5 THE COURT: And this was in a face-to-face
6 conversation, a phone conversation, an email, or how did you
7 communicate it?

8 MS. HUOT: It was in a telephone conversation. It
9 was a meet and confirm on discovery. We had several of
10 these.

11 THE COURT: All right. Based on everything I've
12 heard, I don't believe that there is a sufficient basis for
13 concluding that there a spoliation of evidence in this case.
14 But I do think that in the cost of the delay in producing the
15 Google Hangout messages that defense counsel is entitled to a
16 sworn statement from Plaintiff's counsel providing the
17 information that has been provided to the Court in the letter
18 and in this conversation, this hearing, on an unsworn basis.

19 So provide an affidavit confirming the reason for
20 the delay in the production of these messages, how they were
21 discovered, what it is you told predecessor counsel about the
22 lost cell phone, where the Google Hangout messages were
23 located that is through the -- through Plaintiff's email
24 account. How much time do you need to do that?

25 MS. HUOT: Under -- or two weeks, tops.

1 THE COURT: I will take that under advisement. Why
2 don't we address the other issues in the case and then I can
3 determine -- I'll set up the schedule depending on what else
4 needs to be done.

5 MS. HUOT: Okay. Thank you.

6 THE COURT: All right. The remaining aspect of
7 Defendant's motion to compel concerns a challenge to
8 Plaintiff's attorneys' eyes only designations and redactions
9 of invoices for the per diem work that the Plaintiff has been
10 doing since she was terminated by Defendant's law firm. And
11 these go to Plaintiff's efforts to mitigate damages.

12 Let me ask Ms. Price, why did you wait six months
13 before raising this issue with the Court?

14 MS. PRICE: Your Honor, we were involved in other
15 discovery and really burdened by Plaintiff's numerous
16 demands. As noted in our papers, we've produced over 13,000
17 documents, reviewed hundreds of phone calls, and dealing with
18 technology experts to get these discovery searches completed.
19 And so unfortunately, we were delayed in address this issue
20 with the redactions and attorneys' eyes only.

21 But ultimately, we met and conferred with
22 Plaintiff, and they refused to change their designations to
23 confidentiality -- confidential only, which we believe is
24 consistent with the parties' agreement and the Court's prior
25 ruling.

1 THE COURT: Well, as I understand it, they -- you
2 make it sound as if Plaintiff's counsel dug in their heels,
3 but initially, they had redacted the information. They did,
4 then, un-redact it, and produced it on attorneys' eyes only
5 basis. So you and your colleagues have had access to the
6 information that the Plaintiff is seeking to prevent
7 Defendants from seeing, correct?

8 MS. PRICE: Yes, Your Honor. But I think it's
9 important to note that not all of the invoices were
10 reproduced without the redactions, and that even some of the
11 attorneys' eyes only designated documents still have
12 redactions and it's very difficult to share these with the
13 client because it's just confusing which one is which as far
14 as the redacted versions go.

15 THE COURT: Well, I've looked at all of them, and
16 of the 50-some-odd invoices that were produced, there are
17 exactly three that contain any redactions. Putting aside the
18 attorneys' eyes only issue, I see three that have redactions.
19 And you know, by way of example, I'm looking at an October
20 20th, 2020, invoice, and this is docket entry 46-2, page 60.
21 And there's an invoice for depositions and there's a second
22 one, an EUO examination under oath, of a claimant scheduled
23 for a particular day in 2020, and there is a redaction
24 parenthetical that's then redacted but it has the court
25 of -- cost of appearance.

1 So while it's true that neither you nor the Court
2 knows what has been redacted, I can't -- I don't find the
3 argument persuasive that it's confusing and you can't
4 understand these documents unless they're unredacted in total
5 and available for the client to see.

6 The issue in for which these are produced is
7 mitigation of damages. So you have documents showing the
8 work that the Plaintiff did and what she was paid for it.
9 What is the relevance of, you know, what's the arguable
10 relevance of the information that was redacted and the
11 information that was designated as attorneys' eyes only?

12 MS. PRICE: Your Honor, just to clarify one point.
13 The confusion with the redactions comes from the documents
14 not designated attorneys' eye only. And those are the
15 documents we're permitted to share with our client. So just
16 in having conversations with the client, it's more difficult
17 with the redacted confidential version.

18 Regarding the information in general, Defendants
19 are entitled to this, and it's important that we're able to
20 confirm what work Plaintiff has been doing, especially, to
21 confirm, you know, the rates that she's charging in order to
22 understand her mitigation efforts in full. Additionally, the
23 parties have a confidentiality agreement that specifies the
24 terms of attorneys' eyes only designations, and it simply
25 doesn't meet the standard.

1 THE COURT: Before we get to that, what is it that
2 you're unable to ascertain either because of the -- we can
3 put aside the 3 redactions, it's 3 out of 64. So let's just
4 focus on the information that is attorneys' eyes only, so
5 you're unable to share that with your client, but you have
6 access to it.

7 And from my review of the records, the -- if you
8 look through the records, there are, I think, about three
9 different lawyers or law firms that the Plaintiff performed
10 work for. To the extent that you want to confirm with those
11 attorneys that she did do this work, and no more than the
12 work that she asserts, you have that information and can
13 confirm that, correct?

14 MS. PRICE: Yes, Your Honor. But I think our point
15 is that our client is also entitled to that information, and
16 it doesn't have to necessarily do with the particular
17 relevant or our ability, but that the parties have agreed to
18 certain terms and our client is entitled to this information
19 under those terms.

20 THE COURT: Well, you say your client is entitled
21 to it, and that's for the Court to determine. But I'm now
22 asking the relevance, because while it is true as a general
23 principle that parties should not selectively redact from
24 otherwise discoverable documents portions that they deem are
25 not relevant, that standard can be over -- that presumption

1 against unilateral redactions, or in this case attorneys' eye
2 only designation, can be a showing of good cause can overcome
3 that presumption. And I have not heard anything from you as
4 to why your client needs that information.

5 Plaintiff's counsel offered to provide pseudonyms,
6 so if your client is confused, for example, as to how many
7 different law firms she worked for, she can put A, B, and C,
8 or you could do that. You've got the -- you know, you have
9 the unredacted documents, but to the extent that you think
10 your client ought to know that, your client doesn't need to
11 know the identities of those law firms or the identities of
12 the law firm's clients, and I haven't heard you provide any
13 justification for providing that information other than your
14 conclusory assertion that your client is entitled to it under
15 the protective order.

16 MS. PRICE: Your Honor, I think one thing I'll note
17 is that in redacting the names of the law firms it's clear
18 that it's simply just a tactic to make this more confusing
19 given that at Plaintiff's deposition she testified regarding
20 the law firm she had worked for, and this was not a section
21 of highly confidential attorneys' eyes only portion of the
22 deposition, and our client was there and heard this
23 information. So it doesn't comport that Plaintiff is seeking
24 to redact this or make this attorneys' eyes only given that
25 our clients already had access to this information in a

1 different form.

2 And also, I think we're just trying to understand
3 in full and be able to discuss with our client in full, who
4 is also in the same personal injury realm and can discuss
5 more fully with us, you know, the implications of some of the
6 cases that Plaintiff is working on.

7 THE COURT: Well, Plaintiff in her letter of
8 January 25th, docket entry 49, lists six reasons why it is
9 proper to redact the clients' names, which I take it you have
10 gotten those clients' names. You just want to be able to
11 share them with the defendants. But she points out that many
12 of the clients are minors whose names are not publicly
13 disclosed in their respective lawsuits. She says disclosure
14 of client names will cause Plaintiff to breach her agreements
15 with the firms that engaged her, which require that she keep
16 the names of the firms' clients strictly confidential.

17 She states that many of Plaintiff's clients never
18 filed lawsuits, so we're not dealing with a matter that's
19 public record. She says that, for some, the designations are
20 necessary to ensure compliance with confidentiality
21 obligations under the clients' settlement agreements, and she
22 has several other reasons. But I've heard nothing specific
23 suggesting that your client needs to know who these other
24 clients are, and the arguments that you're making are simply
25 makeweight.

1 MS. PRICE: I understand what you're saying, Your
2 Honor, but I think, you know, all of the cases Plaintiff cite
3 and all the reasons she gives really go toward not disclosing
4 that information publicly. And Defendants are perfectly
5 comfortable with simple confidentiality designations, which
6 is the same thing that Defendants have done. Plaintiffs did
7 not need to know all the details of every case at Defendant's
8 firm, and it's certainly a risk to Defendants to share that
9 information. And yet, Defendants have been required not to
10 redact information and to only use confidentiality markings,
11 and so we're simply asking for the same sharing of
12 information with -- from Plaintiff.

13 THE COURT: Well, isn't there a difference?
14 Because, I presume, for most of the information that's been
15 shared with Plaintiff on a confidential basis, she was
16 representing these clients. She was part of the law firm
17 that was representing these clients, so this is not new
18 information to her. She was exposed to this information in
19 her capacity as an employee of the defendant law firm. You
20 are now asking for information concerning clients of the
21 defendant's competitors, so that information is more
22 sensitive and is more deserving of protection.

23 I'd like to ask Plaintiff's counsel -- now, I'm a
24 little bit confused. Just remind me, did you -- the
25 information that is being withheld from Defendants as opposed

1 to Defendant's counsel, the attorneys' eyes only, is that
2 simply the client identities or was it also the identities of
3 the law firms?

4 MS. HUOT: Your Honor, we are happy to provide the
5 identities of the law firms. All we would like is to keep
6 the client names confidential -- I'm sorry, the client names
7 redacted. We offered to unredact everything else, just the
8 client names to be kept redacted or replaced with pseudonyms
9 like A, B, John Smith, Mike Brown.

10 THE COURT: Well, when you say redacted, they're
11 redacted from the copies that are accessible to the
12 defendants.

13 MS. HUOT: Yes.

14 THE COURT: But defense counsel has access to them,
15 correct?

16 MS. HUOT: We're happy to produce them in two
17 different ways. We've already produced them completely
18 unredacted to Defendant's counsel as attorneys' eyes only.
19 They have a record of every single client. We're also happy
20 to produce them so that the defendant himself can see it with
21 the same versions of the documents except on those documents
22 marked as only confidential, but just redact the client
23 names, that's it.

24 So the only difference would be that the attorneys,
25 Ms. Price, will have the complete document clean, unredacted,

1 marked, attorneys' eyes only, but her client, Mr. Prakhin,
2 will have the same document marked confidential, just the
3 client names redacted. The firms will not be redacted.

4 THE COURT: But I want to understand what
5 Defendants now have access to which is not designated as
6 attorneys' eyes only. Do the defendants have access to the
7 names of the law firms that your client has worked with since
8 her termination by Defendants?

9 MS. HUOT: They have it in multiple different ways
10 because we submitted, you know, 1099s. Those names are not a
11 secret. We're happy to produce that unredacted. We just
12 haven't had -- in our meet and confer we offered to do this,
13 but they rejected it and then filed this motion, so we are
14 left at a point where we are offering to do this, but there
15 was no response of, yes, we'd do that.

16 THE COURT: Well, I'm not asking you now what you
17 offered to do. I mean, I only have the documents in front of
18 me, and I've been asked to compare Exhibit 46-1 and 46-2, you
19 know, Exhibit G and Exhibit H to the motion to compel, and I
20 gather that what the defendant now has access to does not
21 have the names of the firms. Is that accurate?

22 MS. HUOT: Yes, that's accurate. So in the past,
23 we produced only the redacted versions, which is the ones
24 that you see that are redacted. In August 2020, the parties
25 met and conferred about this and through this meet and confer

1 we agreed that the solution would be to produce these
2 documents unredacted as attorneys' eyes only. So based on
3 that, we reproduced all these documents as attorneys' eyes
4 only, unredacted, and we thought that was going to resolve
5 the issue based on our prior meet and confers and prior
6 agreements.

7 This was just a new surprise. That's why we
8 offered to now produce them again and remove everything
9 except for the clients' name, so that's where we are right
10 now.

11 THE COURT: Well, you say that you've produced them
12 in completely unredacted form, attorneys' eyes only, but of
13 the 64 pages that appear as Exhibit H, which is docket entry
14 46-2, there are three pages that do have redactions, and I
15 take it those are portions that you concluded for some reason
16 that even defense counsel should not have access to that
17 information.

18 MS. HUOT: I will double-check those. As far as I
19 remember, I think they implicate some attorney/client
20 communications between Ms. Ruderman and her client. I'm
21 not -- I have to go back and double-check what the substance
22 was, but I believe it was something related to a
23 communication between them, and it has absolutely nothing to
24 do with mitigation efforts. It was so-and-so said something,
25 which we, at the time of the production, thought to redact

1 because she can't waive that. But I believe --

2 THE COURT: I'm not saying that it's material. I'm
3 simply trying to get clarification. To the extent that it's
4 redacted, it should be included on a privilege list. And as
5 I said, there are three such documents at pages 49, 57, and
6 60 of docket entry 46-2.

7 Plaintiff has offered to reproduce the documents in
8 a form that makes clear that all that is being redacted are
9 client names. Or in the case of those three documents, if
10 Plaintiff upon review concludes that those do reveal
11 privileged information should then be included in a privilege
12 list. But otherwise, for the remaining documents, the only
13 thing that should be redacted out is the names of the
14 clients. Those will be produced to Defendant on a basis
15 of -- a confidential basis, but I find that there is good
16 cause to redact the names of the clients so that -- well, not
17 fully redact them. Redact them from the copies accessible to
18 Defendants, defense counsel. Have those names, but I have
19 not heard any reason why defense counsel need those names in
20 order to assess Plaintiff's mitigation efforts, which is the
21 reason why these documents were produced, so that aspect of
22 the motion to compel is granted in limited part only.

23 And I guess in light of the fact that there is
24 additional work that's going to have to be done, I'm going to
25 assume that these confidential, redacted copies should be

1 produced by March 8th. I'll revisit the deadline after I've
2 gone through all the remaining discovery issues. But for
3 now, let's say presumptively that Plaintiff's counsel will
4 provide the affidavit on the first aspect of Defendant's
5 motion to compel, and will produce these invoices in the form
6 that we discussed by March 8th.

7 MS. HUOT: Yes. Yes, Your Honor.

8 THE COURT: All right. That now takes us to the
9 plaintiff's motion to compel. That was docket entry number
10 47, and let me just open up to that. The defendants'
11 response is docket entry number 50.

12 There are four aspects to Plaintiff's motion to
13 compel. In the first, the plaintiff requests an in-camera
14 review of documents identified in Defendant's privilege log.
15 Before Plaintiff files her lengthy application after seeking
16 and obtaining information to file an oversized letter motion,
17 the Court did urge the plaintiff to, you know, not to try and
18 narrow the universe of documents for which she was seeking
19 in-camera inspection. Plaintiff's counsel did not heed that
20 suggestion, and so now, the Court is being asked to conduct
21 an in-camera review of documents on a 12-page privilege log.
22 I have not counted up the number of documents, but I presume
23 it's hundreds.

24 Ms. Huot, do you know the number of documents for
25 which you're seeking in-camera review?

1 MS. HUOT: Your Honor, all these descriptions of
2 these documents appear to me virtually identical. It's
3 possible the majority of them are duplicative. Some of them
4 are instant messages. We count about 15 per page, so 15
5 times 12 would be our guess. I haven't added them up
6 altogether. I counted on the first 5 pages, 5 times 15; I
7 counted them to be 75. So 12 times, but again, they do
8 appear to be duplicative, and there's no way -- the reason we
9 had to include all of them was because they're logged as
10 identical, so there's no way to discern the different
11 descriptions. They just have the same description for all of
12 them, virtually the same. So 12 times 15 would be 180
13 documents, 180 entries. That's the best we can come up with
14 from this privilege log.

15 THE COURT: Well, you raised --

16 MS. HUOT: It appears (indiscernible) messages.
17 Sorry.

18 THE COURT: I have to say that this is -- I've been
19 on the bench for decades now, and in most cases, parties
20 agree that documents that are created after litigation
21 commences need not even be included on a privilege log. So I
22 was somewhat surprised to get this sweeping demand, and
23 you've raised a series of arguments as to why you believe
24 that these communications are not privileged. And among
25 other things, you talk about a document that was prepared in

1 the regular course of business. I just want to clarify, all
2 of these communications occurred after Plaintiff ceased
3 working at the defendant's law firm, and indeed, after the
4 lawsuit was brought, correct?

5 MS. HUOT: Correct, Your Honor.

6 THE COURT: Okay. So that if while it's true if
7 she was then employed at the -- if there was a communication
8 about her work and her -- either the quality of her work or
9 her absences, if those occurred while she was working for the
10 defendant law firm, there certainly would be a strong
11 argument that even if that was -- that outside counsel was
12 somehow involved, that those were made in the regular course
13 of business. But here, those are made after she ceased
14 working for the firm and after litigation was commenced. So
15 how could those be made in the ordinary course of business?

16 MS. HUOT: Sure, Your Honor. And if I could just
17 take one step back, the standard for this, as a matter of
18 law, the defendants need to satisfy a heavy burden in the
19 first instance as their burden to establish the applicability
20 of privilege for these documents. And every single court
21 that has analyzed this issue, from the Eastern District to
22 the Southern District, to the Second Circuit, to the Supreme
23 Court of the United States has said that conclusory
24 statements on a privilege log such as these, saying that the
25 documents were made at the behest of counsel, even after

1 litigation commenced, every single court said that these
2 conclusory statements are not sufficient to carry this
3 burden.

4 Defendants have the burden to submit additional
5 evidence such as deposition testimony, declarations,
6 affidavits, in-camera review. Every single case had
7 in-camera review to prove that these have privileged
8 information in them. In this case, 90 percent of these
9 documents were generated before counsel's involvement, before
10 this counsel's involvement in this case. I counted 67 --

11 THE COURT: Can I just stop you?

12 MS. HUOT: Yeah.

13 THE COURT: Because you say before this counsel's
14 involvement, but we talked earlier --

15 MS. HUOT: Yes.

16 THE COURT: -- about the fact that there was a
17 change in counsel.

18 MS. HUOT: Yes, Your Honor.

19 THE COURT: So --

20 MS. HUOT: But the point is there's no
21 declarations. There's no evidence that would --

22 THE COURT: Let me just ask you. You said 90
23 percent of them occurred before this counsel was involved.
24 Did 90 percent of them occur before any defense counsel was
25 involved?

1 MS. HUOT: No. No. But what I'm saying is just on
2 the first -- I just want to be accurate. I only looked at
3 the first five pages to make this calculation. It was like
4 66 out of 75. But if now -- the point is, is that there is
5 no declaration from predecessor counsel. There's no
6 deposition testimony. In fact, deposition testimony shows
7 the exact opposite.

8 What needs to be shown in this case for Defendants
9 to carry their burden, they need to -- every single case that
10 they cited, all the cases that they cited, they need to
11 either submit the documents for in-camera review in addition
12 to submit declarations, in addition to submitting deposition
13 testimony to establish that the defendants here, an
14 individual was deputized to conduct this investigation and
15 then report these findings back to the counsel, not to the
16 defendants, and that there was direct supervision between the
17 outside counsel and the person deputized. Every single case
18 that they cited supports this and says this is exactly what
19 needs to be shown.

20 In this case, not a shred of this type of evidence,
21 or anything remotely close to this was submitted, and it is
22 their burden to prove this. And on the privilege log, it
23 clearly says that these documents related to Plaintiff's job
24 performance and her employment. This goes back to your first
25 point, Your Honor, is that even if they satisfy their burden,

1 which they didn't even attempt to do and did not come close
2 to doing, even if they satisfy it, this is waived for two
3 reasons.

4 First, they submitted hundreds of emails that talk
5 about Plaintiff's job performance and her employment being,
6 you know, whatever it is. So this is also done in the
7 ordinary course of business, but that's not even the main
8 argument. The main argument is that it's --

9 THE COURT: Well, let me stop you because you're
10 going very quickly.

11 MS. HUOT: All right.

12 THE COURT: I assume they submitted hundreds of
13 emails that before litigation commenced concerning her
14 performance and her employment, correct?

15 MS. HUOT: Yes.

16 THE COURT: So that does not detract from the fact
17 that -- the fact that there were emails on that topic does
18 not mean that emails created after litigation commences and
19 defense counsel is involved, that because it's on the same
20 subject that there's been a waiver. I understand your
21 argument about you want a further showing from defense
22 counsel. Put that aside to the moment.

23 MS. HUOT: Sure.

24 THE COURT: I take it you concur that simply
25 because there are documents on a certain subject produced

1 before counsel is involved does not mean that communications
2 on the same subject after counsel is involved, and presuming
3 there's a showing that counsel asked that the client collect
4 information and documents, but doesn't mean that there's been
5 a subject matter waiver, correct?

6 MS. HUOT: No, not exactly, Your Honor. There's
7 two different points. The ordinary course of business is one
8 issue, which is what Your Honor is speaking of. But the
9 at-issue waiver is a separate issue. Because in this case
10 the defendants' central defense is that Plaintiff's job
11 performance, as he's understood it, was poor, which is why,
12 based on that understanding, he went ahead and terminated
13 her. That it was not because of discrimination because of
14 her disability. It was because she had poor job performance.

15 So in this case, they relied on this particular
16 issue, and now what they're doing is they're trying to shield
17 the emails that are on the very same subject area. It's
18 selective, and that's the case law. There's extensive case
19 law about the sword and shield arguments that say if you're
20 going to rely on a certain subject matter in general,
21 regardless of the timing -- and by the way, Your Honor, in
22 the Koumoulis case, in that situation, the exact same emails
23 and the exact same type of documents were, in fact, held to
24 be this type of sword and shield even though they were
25 generated after plaintiff filed her EEOC charge and after

1 counsel hired -- after the parties hired counsel.

2 So this sword and shield argument is saying that if
3 you're going to rely on a certain subject area and say that
4 this is my central defense because of plaintiff's job
5 performance, you then can't selectively hide certain other
6 documents that talk about the exact same subject matter. And
7 practically, that makes sense because in these types of
8 emails, he could have said the exact opposite than what he's
9 saying in the emails he did produce that he's saying is part
10 of his defense.

11 THE COURT: So I think you are -- with all due
12 respect, I think you are totally missing the limiting
13 principle of the cases that rely on the sword and shield
14 rationale. Those involve influences where, for example, in
15 the seminal Second Circuit case, whose name will come to me
16 shortly, a defendant was going to testify at trial to
17 reliance on advice of counsel.

18 MS. HUOT: In Re Grand Jury, right.

19 THE COURT: No, no. It was U.S. versus -- it was a
20 pre-trial ruling. And the Second Circuit said you can't say
21 that you relied on what your attorney told you and not
22 disclose what your attorney told you. That's different than
23 what you are positing, which is if it's on the same subject
24 matter and you've made disclosures on that subject matter,
25 you can't shield otherwise privileged materials that happen

1 to be on the same subject matter.

2 MS. HUOT: Your Honor, in the Seal (ph) case, which
3 is the EDNY case from 2019, I believe it does say -- and,
4 Your Honor, I understand that this is -- can go both ways.
5 But in that case, the point is, is that they were saying that
6 if you rely on subject matter in certain communications it
7 does support my position.

8 But in this case, it's the defendant who is making
9 these communications. These are party admissions. He's
10 making these communications, not to counsel, he's making them
11 to other witnesses in this case who we deposed who said they
12 have no idea what this is. They never participated in this
13 litigation. All they did was gather documents, hard copies
14 of documents, to produce them in discovery. That's very
15 different --

16 THE COURT: United States v. Filzarian (ph) is the
17 Second Circuit case. And again, the reliance on advice of
18 counsel, that is not what's at issue here. And I understand
19 that you have, you know, you're taking the position that
20 there was a waiver when the witnesses testified about the
21 communications, Prakhin's communications with other employees
22 without any privilege objection.

23 I will say that I looked at those transcript
24 citations, and with one exception, it is totally inaccurate
25 to say that it was without any privilege objection. What the

1 witnesses testified to was the fact that they had
2 communications with one another, but there was an objection
3 to inquiring into the nature and substance of those
4 communications except as to one. So it was only the fact of
5 the communications, and not what was discussed.

6 MS. HUOT: Okay, Your Honor, well taken.

7 THE COURT: With one exception.

8 MS. HUOT: In this case, we're not even asking for
9 wholesale production of these documents to us. We're asking
10 that they be reviewed in-camera. In the case of In Re Grand
11 Jury, July 6, 2005, that case says that such in-camera review
12 inspections are routine and standard. And it happens that if
13 defendants oppose that -- in that case, the defendants
14 opposed the in-camera review and the court held that the
15 burden is a very heavy one. And if you're opposing in-camera
16 review and you didn't provide any other documents besides a
17 privilege log or these conclusory searches, you have
18 absolutely no way of carrying your burden. And in this case,
19 what Your Honor is talking about, the at-issue waiver or the
20 business record, or the standard course of, whatever,
21 standard course of business --

22 THE COURT: Ordinary course of business.

23 MS. HUOT: -- is a secondary issue. The claim
24 itself is that the burden is on the defendants to prove this.
25 They have to prove that they were supervising the defendants.

1 That the defendant was deputized directly by the attorney,
2 and this is the defendant himself, not even an individual
3 person. That he was deputized to go conduct an investigation
4 and report back directly to the attorney, not to the
5 defendant. How can you deputize a defendant himself to
6 report back to not himself, but to the attorney, and that
7 this was created for the purpose of seeking legal advice.

8 There is a case, it's called Medina v. Buther.
9 It's in the Southern District of New York that says that
10 "Where a nonlegal person is asked to provide a response to a
11 matter raised in a document it can't be said that the primary
12 purpose of the document is to seek legal advice because by
13 definition, a nonlegal person cannot render legal advice."
14 And in all the cases cited by the defendants, like in the
15 Gucci (ph) case, in the Carter case, every single case they
16 did three things. They submitted in-camera review, they
17 submitted deposition testimony, and they submitted tons of
18 declarations. And in all of those cases, the court was very
19 particular and said that the defendants sufficiently showed
20 that privilege extends to these group of documents because
21 the declarations show that they were directly supervised,
22 that they were deputized, that they reported back to the
23 counsel.

24 However, it fell short of showing that this set of
25 documents, you know, carry the same application, and so this

1 was produced; this was not produced. In this case, they
2 didn't even try to come close to any of this standard. So as
3 an initial matter, their motion -- like their burden isn't
4 satisfied.

5 THE COURT: Well, you may be right, but that
6 doesn't mean that you automatically have a right to have the
7 Court review almost 200 documents in-camera because I can
8 order them to try to satisfy their burden. And if they don't
9 satisfy their burden, then I can rule that they haven't
10 satisfied their burden.

11 And it's well and good for the Second Circuit to
12 say, you know, from up on the 25th floor that in-camera
13 examination for privilege is routine. That isn't the way it
14 operates when the judges on the front line have 500 civil
15 cases in addition to their criminal case responsibility.
16 They're not there to sort through hundreds of communications.

17 I just have a couple of other --

18 MS. HUOT: Your Honor, may I just have --

19 THE COURT: -- observations to make and one is
20 that -- and I could be misremembering, but I thought that Mr.
21 Prakhin did testify that counsel had asked him to get others
22 to gather documents. That he had been asked to gather
23 documents and information from others in the firm. So you
24 may well say that that's an insufficient showing, but to the
25 extent that he did testify, it's not accurate to say that

1 there was no testimony provided at all.

2 And with respect to the ordinary course of
3 business, again, the cases that deal with ordinary course of
4 business do not involve the situation that we have here.
5 They involve insurance companies which are in the business
6 issuing policies and then responding to claims under it, and
7 there's always the looming threat of litigation. Or in the
8 patent situation where there are patent attorneys who are
9 retained, and that was true in one of the cases that you
10 relied upon, the name of which is somewhat lengthy, and it
11 starts with an R.

12 MS. HUOT: (Indiscernible).

13 THE COURT: And that is different than the
14 situation that we have here where you have, you know, yes to
15 the extent that there were these discussions while she was
16 employed there. Those discussions, you would certainly have
17 a strong argument that they were made in the regular course
18 of business. But to the extent that they occur after
19 litigation has been filed, and where counsel is already
20 representing the defendant and claims to have asked the
21 client to gather this information, that's a different
22 situation.

23 I would make one other observation, and that is
24 we've been talking in terms of a privilege. I've been using
25 that as a shorthand for attorney/client privilege and/or work

1 product privilege. And the standards that you've articulated
2 about having these employees report directly to counsel as
3 opposed to one of the defendants, those points may be well
4 taken if what we're talking about is attorney/client
5 privilege and whether or not this is for the purpose of
6 obtaining legal advice. It's different if we're talking
7 about work product and an attorney asking a client who works
8 for a firm or company to have the client's underlings gather
9 information for use in the litigation.

10 MS. HUOT: Your Honor --

11 THE COURT: I would --

12 MS. HUOT: Oh, sorry. I just wanted to clarify.

13 None of these privilege log entries state that any of these
14 communications were made for purposes of gathering documents.
15 If that's what it said, we would have a different conclusion.
16 What these documents -- none of them say that. They say that
17 they are confidential documents regarding Plaintiff's job
18 performance prepared at the direction of counsel. None of
19 this -- no --

20 THE COURT: I said gathering. I said, yes,
21 gathering documents or information. I believe Mr. Prakhin
22 said that he had been asked to get information to refresh his
23 recollection, so I wasn't limiting it to gathering documents.

24 MS. HUOT: Your Honor, I'm sorry. I don't believe
25 that that's what the testimony was, and I believe that the

1 only testimony on this issue from any of the witnesses was
2 that the only thing they were asked to do was gather hard
3 copies of documents to respond to discovery. That there
4 isn't -- and I can double-check this, but there wasn't
5 something that -- testimony saying that he was acting because
6 counsel told him to do something about an investigation. But
7 otherwise, I just wanted to clarify that.

8 THE COURT: All right. And I know there's another
9 aspect to your privilege argument, and that is the
10 communications with third parties, but I'd like to hear from
11 defense counsel first with respect to these issues.

12 Let me ask why isn't your showing insufficient to
13 sustain the privilege? The burden is on the proponent to the
14 privilege. On what basis could the Court possibly say
15 sustain your burden?

16 MS. PRICE: Your Honor, we feel that the deposition
17 testimony is sufficient to meet the burden, and the privilege
18 log itself. We've accurately reflected the dates that these
19 communications occurred, which is clearly during the
20 discovery period of the litigation and well after Plaintiff's
21 suit was filed. And the deposition repeatedly states that
22 Ms. Raskin, Ms. Larson, and Mr. Prakhin were involved in the
23 collection of information and documentation for this matter.

24 With respect to Ms. Raskin in particular, the
25 question asked of her was other than gathering and collecting

1 documents for discovery, were you involved, and to which she
2 answered no.

3 And so, you know, Plaintiff also has not really
4 shown that that testimony doesn't contradict what's listed on
5 the privilege log. And --

6 THE COURT: Well, it's not enough that they were
7 gathering documents. If Mr. Prakhin, as the principal of the
8 defendant law firm and in his individual capacity, decided to
9 enlist his employees to assist in gathering evidence, he is
10 not representing -- he may be a lawyer, but he's not
11 representing himself in this lawsuit, so that would not be
12 protected by attorney/client privilege or the work product
13 doctrine. Correct?

14 MS. PRICE: Yes, Your Honor. But Plaintiff's
15 document demands and interrogatories specifically requested
16 information about Plaintiff's employment and her work
17 performance, her bonuses, her payroll sheets, and all that
18 sort of information, and it's impossible for the firm, a
19 intangible entity, to collect this information on its own.
20 It has to use its employees to collect this information in
21 order to respond to the demands that Plaintiff propounded on
22 Defendants.

23 THE COURT: I understand that, but that's beside
24 the point. If Mr. Prakhin said I am taking it upon myself,
25 you know, my lawyer gave me the -- you know, sent me a copy

1 of the demands and advised -- and he takes it upon himself to
2 enlist his employees to do the gathering, he's not
3 representing himself, so there's no privilege or protection
4 that would apply to the communications between him and his
5 employees.

6 MS. PRICE: Respectfully, Your Honor, I think I
7 disagree in that if outside counsel instructs Defendant to
8 gather information, Mr. Prakhin could not have gathered all
9 this information on his own. It's simply impossible. We're
10 produced over 13,000 pages of information, and it would be
11 simply impossible for anyone to just -- to do all that on his
12 own, especially when he is not the custodian of many of these
13 records. He has to communicate with the other employees that
14 pulled these records.

15 And I think the case law supports that,
16 specifically in the Carter case or the Gucci case, or in the
17 case the Plaintiff cited in which outside counsel spoke with
18 an in-house attorney or an in-house employee and that
19 employee then went and spoke to other employees. And all of
20 those communications were privileged because it was the
21 purpose of gathering information to go back to outside
22 counsel to help in the representation.

23 THE COURT: Well, I take it since you received no
24 information or notes from predecessor counsel that you don't
25 even know what instructions, you know, what in particular the

1 instructions were, if any, from predecessor counsel?

2 MS. PRICE: No, Your Honor. We have information
3 from predecessor counsel, just not specific to Ms. Ruderman's
4 cell phone. We have plenty of documentation from former
5 counsel. We have emails between former counsel and Mr.
6 Prakhin and other documentation when the case was transferred
7 over. The distinction is we just never received anything
8 regarding the cell phone in particular.

9 THE COURT: That wasn't what I understood you to
10 say earlier. I'm glad that you clarified that.
11 Well, if you have emails from predecessor counsel and those
12 support your position, then those should be provided to the
13 Court, even if it's on an ex parte basis. But you really
14 have made no factual showing or -- I mean to the extent
15 there's any showing, it's little snippets and statements at
16 depositions. It's not even any particular portion that
17 you've cited for the court. I just happen to see it in
18 reading some other portions.

19 But you really have not made any showing whatsoever
20 to sustain the privilege, and I'll give you an opportunity to
21 do that. And to the extent that you believe you can only do
22 it on an ex parte basis, you can make that application, make
23 the showing on an ex parte basis, and I will review it and
24 determine whether or not it's sufficient.

25 MS. PRICE: Yes, Your Honor.

1 MS. HUOT: Your Honor, may I be heard. The
2 underlying documents, if they are what Ms. Price says, that
3 it is responding to discovery demands. So if Mr. Prakhin was
4 told by counsel go print out these documents, and then Mr.
5 Prakhin go tells his paralegal print out these documents,
6 that is not protected by privilege. Even if that was the
7 case, that's why in-camera review, and I know, Your Honor, it
8 may be burdensome and maybe we can narrow it down, but, you
9 know, after consultation with the defendants, but that's the
10 whole point is that the underlying documents need to show
11 opinions, conclusions by counsel, legal theories, legal
12 advice.

13 If it's just go print these documents, which is
14 exactly what Ms. Raskin testified to, that the only thing she
15 was asked to do was compile hard copy documents. They can't
16 be privileged.

17 THE COURT: I think again you are -- you're taking
18 a legal principle and totally misunderstanding its scope.
19 The work -- well, let's talk about work product, and there
20 are different forms of work product. There's mental
21 impressions of an attorney which are entitled to the
22 most -- the highest protection, and then there's ordinary
23 work product. And the ordinary work product does not have to
24 reflect legal advice or a lawyer's thinking process.

25 If an attorney asks the client to do something and

1 the client gathers that evidence and gives it to the
2 attorney, the communications between the attorney and the
3 client or the client's subordinate may well be protected by
4 ordinary work product. And then there has to be a showing
5 made if that doctrine applies, then it's the requesting
6 party's burden to show the need for it. It's not an absolute
7 privilege; it's a doctrine of some protection. This all
8 strikes me as much ado about nothing.

9 But let me ask defense counsel. Ms. Huot had
10 stated that the -- and now I have to go and find the
11 privilege logs --

12 MS. HUOT: Yes. It is document number 47-1. It is
13 Exhibit 1.

14 THE COURT: All right. She said that the -- and
15 I'm about to open that -- that the descriptions do not
16 indicate that the -- a request to gather documents. So what
17 are these? And I'm looking and I'm seeing that the authors
18 are, you know, various -- the parties to these communications
19 are, I assume, you know, individuals who worked for the
20 Defendant law firm. Were they discussing -- without getting
21 into specifics, were they simply discussing among themselves
22 whether or not the plaintiff was a satisfactory employee?
23 Were they gathering documents? You're the only one on this
24 conversation who has seen all the documents. So what's the
25 nature of the documents without getting into specifics?

1 MS. PRICE: Yes, Your Honor. The nature of the
2 documents for the majority is gathering information for
3 discovery, gathering documents, gathering information to
4 respond to discovery and to build Defendant's defense. And
5 we communicated this to Plaintiff's counsel during a meet and
6 confer regarding -- we actually had multiple meet and confers
7 regarding this issue specifically over the summer back in I
8 don't remember which months it was, but back over the summer.
9 And we clarified this issue with Plaintiff's counsel.

10 We provided them with our research and our
11 positions, and now they've brought this up much, much later,
12 even though we've already discussed these issues many times,
13 and tried to clarify that these are relevant to discovery and
14 it is not simply random discussions that were had among
15 employees. And Mr. Prakhin and the other defendants did
16 testify about unprivileged conversations that they had.

17 THE COURT: Well, you say that they testified about
18 unprivileged documents, and there was one -- there was one
19 witness who -- and let me see, I guess it was Erica Larssen.
20 And unlike the other witnesses, Mr. Prakhin, Ms. Raskin, Mr.
21 Zohar -- I might be getting the genders wrong. I don't
22 recall specifically. But with respect to the other three,
23 the attorney defending the deposition instructed the witness
24 not to disclose the substance of the discussion.

25 That was not true for Ms. Larkin (ph.), and her

1 testimony at pages 40 to 42 -- no, I'm sorry, it's 31 to 37
2 of her deposition, she did get into the substance of the
3 discussions. So why wasn't that a waiver?

4 MS. PRICE: Your Honor, I believe there are some
5 objections in that portion of the discovery testimony, but
6 again, those were referring to discussions that were outside
7 the presence of counsels and not at the direction of counsel.
8 And so defendants agree that those types of communications
9 are not privileged. If employees simply wish to have a
10 conversation about Ms. Ruderman or this litigation or
11 anything like that, that's not necessarily -- that's not
12 privileged unless it's for the purpose of seeking legal
13 advice, and that's the distinction between the documents on
14 the privilege logs and what Ms. Larssen testified about.

15 THE COURT: Well, you say it's outside the presence
16 of counsel, outside counsel. I assume that in none of these
17 communications on the very lengthy privilege list with
18 outside counsel CC'd, so in that respect, all of these
19 communications are outside the presence of the, you know,
20 attorneys in this case defending the defendants.

21 I frankly did not see any difference between the
22 areas that counsel was about to get into, Plaintiff's counsel
23 was about to inquire into Mr. Prakhin, Ms. Raskin, and Mr.
24 Zohar and the counsel defending the deposition said no,
25 you're getting into privileged areas. I didn't see any

1 distinction between where that testimony was going and the
2 testimony that Ms. Larssen was permitted to give.

3 MS. PRICE: I understand what you're saying, Your
4 Honor, and that is a good question as to exactly why no
5 objection was made, but even if it's to just that specific
6 portion of Ms. Larssen's testimony, it certainly doesn't
7 waive all of the privilege regarding the communication on the
8 privilege log.

9 THE COURT: All right. Is there anything else you
10 want to say?

11 MS. PRICE: No, Your Honor, just to make the point
12 that again, Defendants welcome the opportunity to provide you
13 with further information if you would like regarding this
14 matter.

15 THE COURT: Well, it's not what I like; it's what
16 your obligation is. If you want to disclose all of this
17 information, that would be the easiest way to resolve this,
18 but you have not sustained your burden by simply making broad
19 generalizations unsworn in your letter to the Court.

20 MS. PRICE: Understood, Your Honor.

21 THE COURT: Ms. Huot, you know, you criticized
22 opposing counsel for not raising certain issues for six
23 months. If this was discussed last summer, why did you wait
24 until the eve of the close of discovery to raise this issue
25 and to ask that the court review hundreds of documents in

1 camera?

2 MS. HUOT: Yes, Your Honor. Based on Counsel's
3 representation about what the substance of these documents
4 were, we had to wait until after deposition testimony so that
5 we can ask these questions at the deposition. As soon as the
6 depositions closed, we engaged in the meet and confer
7 process, which as Your Honor knows takes some time. And we
8 went back and forth, and we were at an impasse, and we
9 documented that impasse, and then moved -- and then we knew
10 there was going to be this particular issue as an impasse and
11 we reported it to the court earlier. And then we had to wait
12 until we reached an impasse on all the other issues and then
13 made an application to the court.

14 So we had to first wait until the depositions were
15 through, which went up against towards the end of 2020.

16 THE COURT: All right. Well, I'm going to give the
17 Defendant an opportunity to make a showing with respect to
18 the applicability of the privilege, and when I say privilege,
19 I use that loosely to encompass attorney work product. And I
20 will -- I'd be prepared to, as a test of those theories, to
21 look at a handful of documents in camera. If Defendants want
22 to propose five documents and Plaintiff can propose another
23 five, then I will have those produced to me for in-camera
24 inspection, and I'll take a look at the factual showing the
25 Defendants will have to make in order to sustain the

1 privilege as to all the documents.

2 And I would also encourage the Defendants to look
3 again at Ms. Larssen's testimony and at her communications to
4 see whether or not in fact a privilege can be sustained with
5 respect to her communications given her testimony.

6 MS. PRICE: Yes, Your Honor.

7 THE COURT: Now, with respect to the communications
8 with experts, the Defendant cites Rule 26B4D, and let me ask
9 Ms. Huot, since the -- I believe the date for expert -- I'm
10 not sure where expert discovery stands. The parties were
11 directed to complete expert discovery including depositions
12 by March 5th. What's the status of expert discovery?

13 MS. HUOT: Thank you, Your Honor. And with respect
14 to this issue, I believe it may be moot at this point because
15 in Defendant's letter on page 7, the fourth sentence of the
16 full paragraph, they said that they would produce the
17 communications relating to the expert they do not end up
18 retaining. The deadline for reporting this has come and
19 gone. It was February 5th. They didn't designate anybody,
20 and the discovery on expert's close is in less than two
21 weeks. So based on their own representations and their
22 letters and their -- I'm sorry, letter, singular, and our
23 meet and confers, multiple, they should not just produce
24 these communications as they haven't retained these people.

25 So there's been no expert discovery and we believe

1 there will be none because nobody was designated.

2 THE COURT: Well, I think you're conflating several
3 issues here because there are testifying experts and there
4 are non-testifying experts. And you're assuming that because
5 the defendant has not designated any testifying experts that
6 it follows that they haven't retained any experts, and that's
7 not necessarily the case. Let me ask, has Plaintiff served
8 any expert disclosures?

9 MS. HUOT: No, Your Honor.

10 THE COURT: So Plaintiff does not intend to rely on
11 experts at trial?

12 MS. HUOT: No, Your Honor. We were only going to
13 do that if Defendants chose to do that, and it appears
14 Defendants did not choose to do that, so we didn't either.

15 THE COURT: I'm going to have to go back on other
16 portions of the docket sheet, but did I give a simultaneous
17 date for the exchange of expert disclosures?

18 MS. HUOT: Your Honor, the way it was set up, it
19 was that the expert discovery was to close on March 5th, and
20 28 days before then would be disclosures. You've got -- Your
21 Honor has extended the deadline several times. The first one
22 was docket entry 14 where you set the schedule for
23 disclosures, depositions, and close of discovery. And since
24 then, it was extended. So if we use the same timeline, it
25 would be February 5th, 28 days before March 5th.

1 THE COURT: All right. So I did set up a date for
2 the simultaneous exchange for expert disclosures. That was
3 what I was getting at. And then 28 days later, the expert
4 deposition, so the -- neither Plaintiff nor Defendants have
5 designated any testifying experts. Ms. Price, is that
6 accurate?

7 MS. PRICE: Yes, Your Honor, that's accurate.

8 THE COURT: And have you retained any
9 non-testifying experts?

10 MS. PRICE: Your Honor, I have to confer with our
11 client on an update regarding that matter, but as stated in
12 our letter and at the meet and confers, Defendants are still
13 willing to produce any of the documents on the privilege log
14 for experts not retained. And we were planning to make all
15 final decisions by the March 5th deadline, which we had
16 previously told Plaintiff's counsel.

17 MS. HUOT: But how can we --

18 THE COURT: Well, I assume that if an expert is
19 retained, that's normally done through counsel, not by the
20 client.

21 MS. PRICE: Yes, Your Honor. We understand that
22 that's the normal process. Our client has been very involved
23 in his defense, so it's just -- it's been a more involved
24 relationship than maybe the standard. And this makes sense
25 given that Mr. Prakhin is an attorney.

1 THE COURT: Well, it doesn't make sense in terms of
2 the protections that the attorney of record and the attorneys
3 at that firm have when they're involved in litigation versus
4 the client who may well be an attorney but does not get, for
5 example, work product. If the client retains an expert, that
6 does not afford them work product protection.

7 MS. PRICE: Yes, Your Honor. I understand. Again,
8 to my knowledge, I have to check regarding whether any
9 experts have been retained or consulting or non-testifying
10 experts. But again, we informed Plaintiff's counsel that we
11 would advise them by the March 5th deadline if any such
12 non-testifying experts were retained and produced documents
13 on the privilege logs for any that are not retained.

14 THE COURT: Well, since we have these discovery
15 issues hanging out there and you're using this as a basis for
16 deferring disclosures that you've agreed to make, I'm going
17 to move up that deadline, and I want you to notify the Court
18 by March 1st as to whether or not any of the experts whose
19 communications are reflected on the privilege log have been
20 retained.

21 MS. PRICE: Yes, Your Honor.

22 THE COURT: And to the extent that you claim that
23 they have been retained and that therefore -- well, if they
24 have been retained, then you are or are not going to produce
25 them?

1 MS. PRICE: If they have been retained, then we are
2 not planning to produce the communications that are specific
3 to the expert or experts that have been retained. But all
4 the other communications will still be produced regarding the
5 experts.

6 THE COURT: Well, to the extent that it is your
7 intention to continue to withhold documents as protected or
8 privileged, then you're going to have to make a sufficient
9 showing with respect to those communications with experts.

10 MS. PRICE: Yes, Your Honor.

11 THE COURT: All right. Let's --

12 MS. HUOT: Your Honor, yeah, I'm sorry. I just
13 wanted to note I agree with that. Also, I just wanted to
14 note the majority of these communications happened more than
15 a year ago, so something like 10 months, 19 months, I'm not
16 100 percent sure of the count, but you can see they're from
17 2019, early 2020. Well, if they retain them now, it's over a
18 year ago that these communications took place, so I do
19 believe they need to make a showing if they want to make any
20 of them confidential. But I just wanted to make sure the
21 Court is aware of the timeline.

22 THE COURT: I'm aware of the timeline.

23 MS. HUOT: Thank you.

24 THE COURT: All right. That brings us to the
25 second issue, which is documents regarding the grievance

1 committee investigation. Pursuant to Rule 608B of the
2 Federal Rules of Evidence, extrinsic evidence, ordinarily,
3 it's not admissible to attack the credibility of a witness
4 who may, however, be subject to cross-examination on that
5 matter. You have the finding -- the conclusion of the
6 investigation, the grievance committee investigation that was
7 done into Mr. Prakhin's practice of recording phone calls.
8 You have an admission that the law firm did in fact record
9 phone calls.

10 The evidence that you're seeking, you're not -- you
11 don't claim that it is relevant to any of the substantive
12 issues in the case. You're simply trying to find additional
13 impeachment evidence with respect to Mr. Prakhin. Is that
14 fair to say?

15 MS. HUOT: Not precisely, Your Honor, although I do
16 appreciate your position on the matter. The investigation
17 itself is relevant and we want to understand it because in
18 this case, the Defendant testified that he engages in this
19 routine practice of recording conversations. And then the
20 Ethics Committee of the New York City Bar Association said
21 that this exact practice smacks of lack of candor and is not
22 ethical. And then Prakhin was reported to the Grievance
23 Committee who conducted an investigation, and then they
24 produced this one-page letter saying that they
25 reviewed -- they reviewed some evidence that was not produced

1 here and concluded there was no breach of conduct.

2 But then they reiterated that it would be unethical
3 and a -- I'm sorry, an ethical violation to make such
4 recordings. And in in the Defendant's deposition, he
5 testified that he continues to make these recordings. So we
6 want to understand this investigation because it's really
7 unclear, and we want to be able to use the investigation to
8 prove, you know, that he has a propensity for deception.
9 That's what makes this investigation relevant.

10 THE COURT: Well, that's exactly what I said. It
11 simply goes to credibility. It does not go to the issues in
12 the case, and it's really a frolic and detour to find more
13 impeachment material. You can certainly question him at
14 trial, as I presume you did at the deposition, about the
15 findings. Well, I shouldn't say you can. That will be up to
16 the trial court.

17 MS. HUOT: Right.

18 THE COURT: But that does not provide a basis for
19 opening up the investigative style on an issue that has no
20 bearing on the claims in this case other than to impeach Mr.
21 Prakhin. So that aspect of the Plaintiff's motion is denied.

22 With respect to the next issue in the case, the
23 Saga notes, the internal case notes, the -- I believe that
24 the Plaintiff's position is that one of the reasons that was
25 offered by Defendants, which Plaintiff disputes, one of

1 the -- and this pretextual, but one of the reasons provided
2 for her termination was that she wasn't entering Saga notes
3 about her cases or was entering insufficient notes. In
4 Defendant's response, the Defendant denies that it
5 was -- that she was terminated because the notes themselves
6 were insufficient. It's the Defendant's position, as I
7 understand it now, that she was terminated because she wasn't
8 making the Saga notes in all her cases or in all instances
9 when they should have been made.

10 Let me ask Mr. Price, is that an accurate reading
11 of the Defendant's position?

12 MS. PRICE: Yes, Your Honor. That's an accurate
13 reading of Defendant's position and Mr. Prakhin's testimony.
14 You know, the cited testimony cited by Plaintiff and I
15 believe by Defendants in this motion is he repeatedly stated
16 it's based on the absence of notes and the failure to enter
17 notes were one of the reasons for her termination.

18 THE COURT: And let's assume that that is the
19 Defendant's position now and will be the Defendant's position
20 at trial. Was the plaintiff ever told that she was
21 terminated because the notes that she entered were
22 insufficient as opposed to -- that a note, you know, not
23 that -- to distinguish between failure to make any notation
24 as opposed to the notation that you made was inadequate.

25 MS. PRICE: Your Honor, I do not believe the

1 deposition testimony covered that at all. It only reflected
2 Mr. Prakhin's statements about her failure to make notes, and
3 she was repeatedly advised at numerous reviews of her
4 performance that she had failed to make notes and needed to
5 make more entries.

6 THE COURT: Were there any contemporaneous
7 documents regarding the discussions between Plaintiffs and
8 either Mr. Prakhin or someone at the firm about the
9 Saga -- the need to make notations under Saga? Was there a
10 written review, any letter, any confirming email?

11 MS. PRICE: No, Your Honor. As reflected in Mr.
12 Prakhin's testimony, all of these conversations occurred in
13 person.

14 THE COURT: All right. Ms. Huot, do you have -- do
15 you dispute that that was the Defendants' position?

16 MS. HUOT: Yes, Your Honor. Ms. Pot -- I'm sorry,
17 Ms. Ruderman was questioned for over an hour on the
18 sufficiency of the entries in the Saga system. They went
19 through each one to assess whether it was sufficient,
20 criticizing her saying that another attorney could never pick
21 up the file, review your entries, and know what's going on in
22 the case, that this was in her deposition testimony, not Mr.
23 Prakhin's because they questioned her on this for over an
24 hour. They went through each of her entries and said it was
25 not sufficient. It was not robust enough. And in response,

1 she was saying it was on par with all her colleagues, if not
2 better than her colleagues' entries.

3 In this situation, there's actually no dispute that
4 these documents should be produced. The Defendants have
5 offered to produce them. The only dispute here is the cost
6 shifting issue that as a background, just to take one step
7 back quickly just to understand the disparity here, in 2019
8 alone, Mr. Prakhin's firm made over \$30 million and showed
9 over \$11 million in profit. Separately from this, Mr.
10 Prakhin made an additional \$7.6 million individually while
11 plaintiff is struggling to find work and make ends meet. And
12 under the Zubulake factors, you can't shift costs.

13 Defendants have offered to produce these documents,
14 which were originally in electronic form, then they chose to
15 print them, and now they want to produce it to us for 75
16 cents a page, where a quote from Kinkos has them at 8 cents a
17 page, a quote from Staples has it at 13 cents a page, and the
18 clerk of the court has it at 2 cents per page. Or they could
19 just -- it's a state-of-the-art firm that Ms. Price is at.
20 They have a scanner. They've represented that it's about
21 1,000 pages, and in their motion here in their letter, they
22 cite it's over 1,000 pages. It's certainly not over 2,000
23 pages. That's four inches of paper. That would take less
24 than 10 minutes to feed through a scanner. That's all they
25 have to do, or give it to us, we'll make a copy ourselves.

1 There's actually no dispute that these documents should be
2 produced. It's just a matter of how they're going to do it,
3 and can they shift the costs?

4 THE COURT: Well, I'll be the one to determine
5 whether or not they should be produced notwithstanding the
6 fact that counsel apparently -- Defense counsel apparently
7 spent a lot of time questioning Ms. Ruderman about the
8 robustness of her entries. I guess they determined that they
9 were barking up the wrong tree because they've now suggested
10 that they are going to -- that the approach that they're
11 going to take is that she wasn't making notations when she
12 should be making them as opposed to challenging the
13 sufficiency of the individual entries.

14 MS. HUOT: But Your Honor, they want --

15 THE COURT: Excuse me.

16 MS. HUOT: Excuse me.

17 THE COURT: To the extent that the Defendant was
18 prepared to stipulate that it is not challenging and is not
19 challenging the robustness of her entries, doesn't that
20 narrow the issue?

21 MS. HUOT: Your Honor, we want to make -- that may.
22 And we offered to do this before. We offered the stipulation
23 to them before and they denied this. We want to make the
24 argument that her entries were more robust. That's why they
25 were less frequent, to the extent they were less frequent

1 than her colleagues. So we need to examine the entries
2 because Defendants have put a huge emphasis on these
3 documents.

4 THE COURT: Well, but they're now prepared to say
5 that it was that she made fewer entries, and to tell you the
6 truth, I mean I'm not familiar with that system and just
7 looking at the attachments, it was somewhat confusing, but I
8 did note that there were relatively few pages of Plaintiff
9 entries as opposed to the entries of other individuals.

10 MS. HUOT: Your Honor, if there's a disparity in
11 the number, our argument is that her entries were more
12 robust. They were more detailed than her colleague. They
13 can't -- if they want to stipulate to that, we'd be happy to
14 accept that. That would resolve this issue. Instead, what
15 they have offered to do is produce the documents, which we're
16 also happy to take.

17 THE COURT: These documents, you've indicated that
18 they are in electronic form, but the Defendants have printed
19 them out to 1,000 pages. Is that what we're dealing with?

20 MS. HUOT: As far as I understand.

21 MS. PRICE: Your Honor, if I may answer your
22 question?

23 THE COURT: Yes.

24 MS. PRICE: The Saga records are -- it's a very
25 specific computer type, from what I understand, and they

1 cannot simply be transferred to a file that can be sent
2 electronically. The only way to obtain them from the Saga
3 platform is to print them. And to do this, Defendants had to
4 individually click on every single entry and print it out.
5 Defendants have taken the time to do this in an effort to
6 compromise with Plaintiff on this issue so as to not to have
7 to involve the Court's time in this matter, but Plaintiffs
8 rejected over and over again our attempts to compromise, and
9 so we have the printed records available at our offices for
10 her inspection, which is compliant with the Federal Rules of
11 Procedure which repeatedly state in Rule 26 and 34 that
12 making documents available for inspection meets our
13 obligation.

14 THE COURT: Well, let me just clarify this because
15 I'm getting these numbers thrown out at me, but nobody,
16 despite arguing about the cost, no one bothered to tell the
17 Court how many documents we're talking about, what the cost
18 would be.

19 So let me ask Ms. Price, you printed out all the
20 responsive documents and they're available?

21 MS. PRICE: Yes, Your Honor. Ultimately,
22 Defendants decided to bear the cost of printing them out
23 themselves and have made them available for free at
24 Defendants -- at our office of Putney Twombly for
25 Plaintiff's inspection, and it's 1,577 documents.

1 THE COURT: And what is the cost of copying those?

2 MS. PRICE: I believe our paralegal charges \$90 an
3 hour, and so she would have to spend however much time
4 scanning and copying those. I'm not sure how long it would
5 take her.

6 THE COURT: And let me ask Ms. Huot, if those
7 documents were sent to a commercial copier, like a Kinkos,
8 how much do they charge per page?

9 MS. HUOT: Eight cents per page, Your Honor.

10 THE COURT: And is that a problem for the
11 Plaintiff?

12 MS. HUOT: No, Your Honor. That comes out to
13 \$126.16. We're happy to bear that. I think that's less time
14 than we've spent on this motion.

15 THE COURT: All right. So that's how that will be
16 resolved, that those pages, you know, find a commercial
17 copier who will -- and Counsel should make the arrangements,
18 but the cost will be paid by Plaintiff, but it will be a
19 commercial copier, and it will not be at \$90 an hour.

20 MS. HUOT: Your Honor, can I just please have some
21 clarity on this. If it's \$126, we're happy to bear that. If
22 we could just take the documents ourselves, that would be
23 fine ourselves. I just don't -- if they could just fed right
24 through the copy machine to be sent to us, that would be
25 free. This doesn't have to go through a vendor. They could

1 just do it on the copy machine in under 10 minutes. I don't
2 really understand. If it's \$125, we're happy to bear it, but
3 I don't -- I don't know -- we're not going to -- I don't know
4 what the extent of that will be if it's more than that.

5 THE COURT: Well, what is it that you are proposing
6 to do? You will personally go and pick them up?

7 MS. HUOT: No, Your Honor. I don't -- I think it
8 would cost no money at all if it's fed through a scanner and
9 just emailed to us. That would take less than 10 minutes.
10 Because of the pandemic, I can't go there to do it myself,
11 but I'm sure that it would have cost less money for Ms. Price
12 to just put them on a scanner and scan it to us, and it would
13 to brief this motion. I just ask if they can just scan it
14 and email it to us, or I can send them a secure filing. We
15 don't need it in hard copy. We could take it in electronic
16 form, which they have it already in hard copy. They could
17 just feed it through a scanner. Just to scan 1,500 documents
18 takes less than 10 minutes. That would be \$9.

19 THE COURT: Well, Ms. Price said that these entries
20 can't be transferred electronically, which frankly, I find
21 hard to believe.

22 MS. HUOT: No, Your Honor, they're already printed.
23 That's what she means, Your Honor. I don't mean to put words
24 in her mouth, but I believe what she means is the Defendants
25 have already printed them, and there's 1,577 pages of --

1 THE COURT: No, what she said -- what she said was
2 they can't be transferred electronically. You have to print
3 them and we've done that.

4 MS. HUOT: Yes.

5 THE COURT: It wasn't that we've done that
6 therefore, we can only -- we'll only produce them in hard
7 copy. What she stated to the Court, and that the Court finds
8 hard to believe, is that they can't be transferred
9 electronically.

10 MS. HUOT: Right, right.

11 MS. PRICE: Your Honor, if I may clarify. They
12 can't be transferred electronically directly from Saga. The
13 only way to get them out of the program is to print them,
14 which is what we have done. Of course, the paper copies
15 could be scanned, but again, it would cost our paralegal \$90
16 an hour to scan all of those documents. And if Plaintiffs
17 would like to pay for that in lieu of coming in herself,
18 that's fine, but Defendants should not have to bear the cost
19 of scanning these documents for Plaintiff's convenience when
20 they've met their discovery obligation.

21 MS. HUOT: Your Honor, I can't imagine it taking an
22 hour to scan 1,577 pages. And in this situation where the
23 Plaintiff makes over --

24 THE COURT: Well, I'm sorry, if it takes an hour,
25 that's \$90 --

1 MS. HUOT: Sure.

2 THE COURT: -- so that's less than --

3 MS. HUOT: We will pay the \$90.

4 THE COURT: So let me ask Ms. Price, what is it
5 that -- how much is it going to -- do you want to be able to
6 charge Plaintiff's counsel to copy less than 1,600 pages?

7 MS. PRICE: Your Honor, we would be willing to let
8 her come to our office and copy at the price of any
9 commercial copier. If she wants to do 8 cents a page, that's
10 fine. She doesn't have to take it to a third vendor. We're
11 welcome to use our offices, and that's what we've made
12 available to her. Plaintiff simply has to come in and COVID
13 I don't think is an excuse given that Plaintiff was happy to
14 do her deposition in-person. This task does not require the
15 removal of masks.

16 THE COURT: Well, first of all, that really is
17 unfair because I don't think she was happy to do it. She
18 talked about her client's visual problems and that her client
19 needed to do it in-person because file sharing was not going
20 to work given her visual problems. And as I understand it,
21 all other depositions have been done remotely. So I really
22 don't want to hear that she was happy to do the deposition in
23 person. So let's be practical about this, and it sounds to
24 me like Defendants are just being vindictive now.

25 You've got 1,600 pages, and I could order you to

1 just take those 1,600 and put them in an envelope and -- do
2 you need them in hard copy? You've got the program, so do
3 you really need to keep them in hard copy? You can access
4 them electronically.

5 MS. PRICE: Defendant's Counsel cannot access them
6 electronically. We only have access to the one hard copy
7 that's currently available. And Your Honor, respectfully,
8 we're not trying to be vindictive. We're just not trying to
9 bear any more costs for this expensive discovery process that
10 we've had to go through.

11 THE COURT: I could ask you what your hourly rate
12 is because I'm sure it's far exceeded the amount of money at
13 issue on this particular aspect of the dispute. This is
14 exceedingly frustrating. If the paralegal charges \$90 an
15 hour and you want to charge for the paralegal's time to make
16 a copy, it should not take more than an hour. So then charge
17 the \$90 and have the set sent to Mr. Huot.

18 MS. PRICE: Understood, Your Honor. And just to
19 clarify, we're charging the \$90 or less to Plaintiff?

20 THE COURT: Yes. But I understood that you had
21 wanted 75 cents a page, which is not the cost.

22 MS. PRICE: Your Honor, that was --

23 THE COURT: This is not intended to be a
24 profit-making business.

25 MS. PRICE: Understood, Your Honor. And that was a

1 first offer, and there have been multiple offers to work with
2 Plaintiff since then. And we're happy to comply with this
3 current arrangement.

4 THE COURT: All right. And I'm assuming that what
5 we're talking about is going to be less than an hour to feed
6 the documents into a copy machine. So charge for the
7 paralegal's time not to exceed \$90, and I suppose you're
8 going to want the postage as well, so add the postage and
9 let's move on.

10 MS. PRICE: Yes, Your Honor.

11 MS. HUOT: Your Honor, there's one outstanding
12 issue if I may?

13 THE COURT: Now you're going to ask for years and
14 years of records, correct?

15 MS. HUOT: No, Your Honor. No. We just ask for
16 the records that we requested. This is a different issue. I
17 was going to move on.

18 THE COURT: All right. I thought there was another
19 issue about whether or not the -- you've asked for all of her
20 Saga entries from 2012 through 2017.

21 MS. HUOT: Oh, we would -- I thought that was
22 resolved. We would take any sampling of that just to show
23 that our prior entries were the same as they are right now,
24 that they were the same before as they were after. She was
25 employed there for four years. She was never disciplined or

1 terminated for insufficient Saga records in the four years
2 she was there. We assume the ones before are going to be the
3 same as the ones now. If Defendants want to stipulate to
4 that, we are absolutely happy to forego this document
5 production, if Defendants will stipulate to that.

6 THE COURT: Let me hear from Ms. Price.

7 MS. PRICE: Your Honor, Defendants are not willing
8 to stipulate to that, and also don't feel that the records
9 from Ms. Ruderman's first employment are at all relevant. At
10 no point in time have Defendants claimed that Ms. Ruderman's
11 Saga entries from her prior employment were good, bad,
12 neutral, or anything. There's been no comment on her Saga
13 records from that time, and Mr. Prakhin testified regarding
14 his view of Plaintiff's performance during her prior
15 employment at which time she was highly supervised, and you
16 found essentially no issue, not good, not bad is a summary of
17 the testimony.

18 And so the five years of records from Saga, which
19 it's not even clear if we would have access to that given
20 this is extremely old, are simply not relevant. And it's not
21 necessary to litigate the essential matters in this case.

22 MS. HUOT: Your Honor, we would just take --

23 THE COURT: When did her employment end in 2017?

24 MS. PRICE: Approximately February, Your Honor.

25 THE COURT: And let me ask Ms. Price, was there any

1 material difference between her Saga entries during her first
2 period of employment and her subsequent period of employment?

3 MS. PRICE: Respectfully, Your Honor, I don't know.
4 I haven't reviewed those documents. Those haven't been
5 printed out.

6 THE COURT: Well, I believe that there is some
7 relevance to the extent that her Saga entries in the first
8 period were not materially different than those afterwards,
9 then certainly that is a circumstance from which Plaintiff
10 could argue that the termination based on inadequate or an
11 insufficient number of Saga entries was pretextual, but the
12 period demanded is overly broad and burdensome. I will
13 require that those records be produced for a one-year
14 period --

15 MS. HUOT: We would take --

16 THE COURT: -- 2000- -- well, if she was there
17 until February of 2017, for the one-year period predating her
18 departure for the first time.

19 MS. HUOT: Sure, yes, absolutely.

20 MS. PRICE: Yes, Your Honor.

21 THE COURT: And I guess those will have to be
22 printed out and then the same ruling with respect to the
23 copying. I presume we're probably talking about -- well, it
24 might be a much smaller number because this is only
25 Plaintiff's Saga entries and not those of other employees.

1 So I assume it's going to be a much smaller number of
2 entries.

3 MS. PRICE: Yes, Your Honor.

4 THE COURT: And those should be copied and provided
5 to Plaintiff.

6 All right. We have one final issue, and that is
7 the Defendant's technology consultant, and having read the
8 varying descriptions provided by the IT person, Mr. Pucachev
9 (ph.). Defense Counsel's response to the motion assumes that
10 Mr. Pucachev not only retrieved the documents in question,
11 the IP messenger, but that he also searched those documents.
12 And even his latest iterations of what he did do not say that
13 he conducted the search. So I'd like to know who is it, Ms.
14 Price, who did conduct the search?

15 MS. PRICE: Your Honor, our understanding from when
16 we received the documents from Mr. Pucachev was that he did
17 conduct the search. We understand that unfortunately his
18 testimony did not reflect this, but that was our
19 understanding. Additionally, I think what's important to
20 emphasize is that Defendants operated on that assumption. So
21 all of the documents we were provided were simply reviewed
22 for relevance and then produced. So if anything, we
23 overproduced documents instead of underproducing because a
24 search would have only eliminated more documents.

25 THE COURT: I'm a little confused because again,

1 your letter does say Mr. Pucachev conducted the search. That
2 was not his testimony, nor is that what he says on either his
3 errata sheet, which he said I did retrieve and print IP
4 messenger and was paid for that, and then his affidavit, and
5 I'm looking at paragraph 6 and 7, and he says he retrieved
6 messages to the firm's counsel in text format in paragraph 7,
7 "I was able to retrieve messages from the firm's IPMS for all
8 custodians' computers except for Irene Gabo (ph.) and Steven
9 Ravis (ph.), who are no longer employed."

10 So are you saying, if I understand what you're
11 saying, Ms. Price, that Mr. Pucachev produced all the
12 messages that he retrieved, and you went through all of them?

13 MS. PRICE: Your Honor, I guess that's what
14 occurred. He originally represented to us when he produced
15 the messages to us that he had searched them, according to
16 the protocol. That was our understanding when we received
17 the messages. If he did not search it, then he simply
18 produced all of the messages to us.

19 THE COURT: Well, again --

20 MS. PRICE: Either way, all of the messages --

21 THE COURT: -- he may -- he may have told you that,
22 but that is not what he says in his revised sworn
23 explanation. He says he was able to retrieve them. He
24 doesn't say -- all he says is that he retrieved them. So how
25 were they produced to you, and how many messages were there?

1 MS. PRICE: Your Honor, they were produced in an
2 electronic format from Mr. Pucachev, and the format was the
3 text format, so there weren't page numbers to associate. But
4 it came from multiple accounts, all of the custodians were
5 present, and so we simply reviewed what was produced, changed
6 it into the PDF format, and then provided that to Plaintiff's
7 Counsel.

8 So my point is that even if Mr. Pucachev did not do
9 the search and produced everything to us, we have then
10 produced everything to Plaintiff's Counsel because we only
11 reviewed for relevance, assuming he had done the search.

12 THE COURT: You assumed that he did a search using
13 the search terms?

14 MS. PRICE: Yes, Your Honor. Excuse me, relevance
15 and privilege were the only things we reviewed for.

16 THE COURT: And I understand that there weren't
17 page numbers, but does this mean that what you may have
18 received were the entire contents, like every communication
19 during a certain period of time for a particular custodian?

20 MS. PRICE: That's possible, Your Honor. I'm not
21 sure at this point based on Mr. Pucachev's conflicting
22 testimony. All I know is what we received and what we did
23 once we received that information.

24 THE COURT: Well, you know, you yourself referred
25 to his conflicting testimony, and the Court is not satisfied

1 that either it or Plaintiff's counsel knows what happened
2 here. So how do you propose the Court should rectify that
3 situation?

4 MS. PRICE: Well, I don't think the situation needs
5 to be rectified because relevant responsive documents have
6 been produced, and that's evident from the production. The
7 worst case scenario is that we over-produced information that
8 we weren't required to produce under the ESI protocol. If
9 the search was never conducted, we simply produced everything
10 aside completely irrelevant or privileged information. And
11 so there's no need to rectify anything because there was no
12 harm to Plaintiff.

13 THE COURT: Well, that again assumes that you were
14 given the appropriate documents to review for relevance and
15 privilege. And it's unclear to the Court what it is he
16 pulled, you know, what protocol he followed in determining
17 what he needed to retrieve. And as you say, he's given
18 conflicting sworn statements as to what he did. I'm not even
19 sure how he would remember since he testified under oath at
20 his deposition that he didn't remember, and then he puts
21 in -- he does an errata sheet and a perfunctory affidavit in
22 which he states that he retrieved these messages, and from
23 that Defense Counsel then argues to the court that he
24 searched for them, which he never says.

25 MS. PRICE: Yes, I understand, Your Honor, but that

1 was our understanding based on his representations to us that
2 he had searched.

3 THE COURT: Ms. Huot, what do you propose in order
4 to get to the bottom of this? You did get 129 pages of
5 messages that were produced by Defendants, correct?

6 MS. HUOT: I believe it was
7 approximately -- honestly, I did not count it. What we
8 believe happened, and we're again also unsure, but a review
9 of these records, we think it was retrieved from a single
10 custodian. It was retrieved from Raskin, and the only
11 communications are between Raskin and other individuals.
12 Other individuals show up on the records when it's a group
13 message or when they're responding to one custodian, Raskin.
14 It's very difficult to understand it if that's what happens,
15 but I believe that's the answer here.

16 We would like a search to be conducted on all of
17 the custodians, as it was supposed to be on the ESI protocol
18 with the search terms. We don't believe that that was
19 conducted, and in the deposition testimony, Mr. Pucachev did
20 not say it was -- he said the opposite, that it was not
21 conducted. And again, like Your Honor mentioned, the
22 affidavit now does not say that it was conducted. We would
23 like that search to be conducted.

24 THE COURT: Ms. Price, you, in passing you said
25 that when the documents were produced in electronic format,

1 it was from multiple accounts. We reviewed it and the
2 custodian -- I think you said in the presence of the
3 custodians. Is that correct?

4 MS. PRICE: No, Your Honor. We did not review in
5 the presence of custodian, but we did receive messages from
6 all of the custodians. And if the Court would like, we can
7 produce ex parte information showing that what Mr. Pucachev
8 provided us was from different custodians, but it's obvious
9 from the documents that we have produced that these
10 conversations are between different individuals. Plaintiff
11 simply has to match them up, just like Defendants have to do.
12 It was the format that they exist in, and as we indicated in
13 our papers, if you compare the documents, you can figure out
14 who the conversation is between.

15 THE COURT: Well, Ms. Huot said that from her
16 examination, she concludes that these documents were
17 retrieved from a single custodian, Raskin, that he seems to
18 be involved in all the conversations, and there may be
19 communications with various different people, but he's the
20 common denominator. I'm not sure how you would persuade me
21 otherwise, nor do I understand why that's something that
22 should be addressed ex parte. This is not an issue of
23 privilege, unless you're telling me that the way you
24 identified who the custodian was was from a privileged
25 conversation. But if you're not saying that, then I don't

1 see why you should make an ex parte submission. I think you
2 should satisfy your adversary that messages from all of the
3 custodians have been provided.

4 MS. PRICE: Your Honor, two points. First, yes, it
5 is a privileged communication between counsel that would
6 indicate exactly why all of the custodians were searched.
7 But we have also satisfied our burden to plaintiff, as I just
8 noted, that a comparison of these documents indicates that
9 these are not just between Raskin and someone else, but
10 between the paralegals, between Mr. Prakhins, between
11 Ruderman and her paralegal. For example, you know, page
12 Bates stamp 1983 compared with page 2064 indicates that this
13 is a conversation between Fellows (ph.) and Larzen (ph.). So
14 we're really not sure where Plaintiff gets their
15 understanding that this is only a conversation with Raskin.

16 THE COURT: Well, I don't know, but I think that
17 ought to be a further conversation between counsel, Ms.
18 Price. You yourself referred to Mr. Pucachev's conflicting
19 testimony. This is a problem of the defense witness's
20 making. You should unravel it, and if you can explain -- if
21 you can feel you can demonstrate to the Court that these
22 communications are from different custodians, then
23 demonstrate that to your adversary.

24 All right. So we now -- I said I would circle back
25 regarding the deadline. I believe I set one deadline for

1 March 1st. That was for the Defendants to indicate what, you
2 know, whether they are retaining non-testifying experts and
3 to make the disclosure -- well, and to make the disclosure of
4 those that they said they would make once they made that
5 determination. The other deadline that was proposed is March
6 8th. I will set that as the deadline for providing the
7 additional information that I've ordered in connection with
8 these various motions as well as for joint status report from
9 the parties regarding this last issue of the method of search
10 for the IP messenger.

11 MS. HUOT: Your Honor, may I add one more issue
12 before we close out? Would that be okay?

13 THE COURT: Okay.

14 MS. HUOT: Thank you. The reason it wasn't brought
15 up in our letters was we thought it was a resolved issue, and
16 I just wanted to make sure to raise it here just in case
17 because we're coming up against the close of discovery. This
18 relates to the audio recordings. As early as December 4th,
19 we conferred about the vendor Televox. And the issue there
20 was these recordings that were at always issue in this case,
21 and the production of this is not really disputed, it's just
22 the timing of it. So Televox is a vendor that does the phone
23 recordings. And in the past, Televox only searched for
24 recordings for Prakhin, Ruderman, and Raskin's phone numbers.

25 And then after the meet and confer, Defendants

1 agreed to go ahead and go back to them and get the recordings
2 for the rest of the attorneys. And we were assured
3 repeatedly, even up until the eve of when our
4 motion -- letter motion was submitted, that this would be
5 produced imminently. So we didn't think we were at an
6 impasse about it, and we only wanted to address issues that
7 we were at an impasse about in these letters. To date, like
8 this was already, you know, almost three months -- almost
9 three full months ago, it still hasn't been produced. So I
10 just wanted to flag this issue. I didn't want it to go very
11 long without flagging it, but we really need these
12 supportings, and we don't know how much longer we have to
13 wait for them.

14 THE COURT: Have you raised this recently with
15 opposing counsel?

16 MS. HUOT: Yeah. We've been talking about it
17 through email multiple times. Ms. Price, Nicole, I don't
18 remember how many times we've exchanged information about
19 it -- communications about this. We have exchanged
20 communications about this, yes.

21 THE COURT: And --

22 MS. PRICE: Yes. We have exchanged communications.
23 The last time we discussed it was, as you stated, right
24 before you had filed your motion papers. My understanding is
25 that there has been an update and that they will be produced

1 hopefully by this Friday was the latest that I heard --

2 MS. HUOT: Great.

3 MS. PRICE: -- but I can certainly provide
4 Plaintiff with an update.

5 THE COURT: All right. Well, you can follow up on
6 this. This is not an issue that's currently before me. I
7 encourage you to have discussions with one another and to try
8 to resolve that. I think there have been entirely too many
9 disputes in this case over matters that should have been
10 resolved. We've now been at this for two and a half hours,
11 so I'm prepared to conclude the proceeding. Everyone, please
12 take care and stay healthy. Goodbye.

13 MS. HUOT: Thank you, Your Honor. We appreciate
14 your time.

15 MS. PRICE: Thank you, Your Honor.

16 (Proceedings adjourned at 5:30 p.m.)
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TRANSCRIBER'S CERTIFICATE

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

December 28, 2022

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| _____ | _____ |
| Courtney Montgomery | DATE |
| Legal Transcriber | |